

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries

Law Journals

7-31-2022

Diamond Nat. Res. Prot. and Conservation Ass'n vs. Diamond Valley Ranch, 138 Nev. Adv. Op. 43 (June 16, 2022)

Anne-Greyson Long

Follow this and additional works at: <https://scholars.law.unlv.edu/nvscs>



Part of the [Law Commons](#)

Recommended Citation

Long, Anne-Greyson, "Diamond Nat. Res. Prot. and Conservation Ass'n vs. Diamond Valley Ranch, 138 Nev. Adv. Op. 43 (June 16, 2022)" (2022). *Nevada Supreme Court Summaries*. 1520.
<https://scholars.law.unlv.edu/nvscs/1520>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

NRS 534.037 and NRS 534.110(7): Doctrine of Prior Appropriation

Summary

This case addressed the scarcity of water in the Diamond Valley Hydrologic Basin located in Eureka County, Nevada. The Basin was over-appropriated and over-pumped causing the groundwater withdrawals from the Basin to exceed its perennial year. In 2011, Nevada Legislature enacted NRS 534.037 and NRS 534.110(7) to address the scarcity of groundwater in Nevada's over-appropriated basins. NRS 534.110(7) provides that the State engineer may designate an over-appropriated basin a Critical Management Area (VMA). After an area is designated, NRS 534.037 allowed rights holders to petition the State Engineer to approve a Groundwater Management Plan (GMP) that set forth the necessary steps for removal of the basin's designation as a CMA. Finally, to determine whether to approve the GMP, the State Engineer is required to weigh the factors under NRS 534.037(2).

Diamond Valley was designated a CMA and its rights holder submitted a GMP to the State Engineer for approval. The GMP deviated some from the guiding principles underlying Nevada's water law statutes (the doctrine of prior appropriation, which dictates that priority is assigned based on first in time, first in right to put the water to beneficial use). The State Engineer approved the Diamond Valley GMP.

The crux of the case was whether NRS 534.037 and NRS 534.110(7) allowed the State Engineer to approve a GMP that deviated from the doctrine of prior appropriation. The Court held that the Legislature unambiguously gave the State Engineer discretion to approve a GMP that departed from the doctrine of prior appropriation and other statutes in Nevada's statutory water scheme.

Facts and Procedural History

The Court had previously recognized that groundwater in "Diamond Valley, Nevada is over-appropriated and has been pumped at a rate exceeding its perennial yield for over four decades."² Every year about 76,000 acre-feet of groundwater is withdrawn from the Basin's aquifer, yet its perennial yield is only 30,000 acre-feet. Despite the facts, 126,000 acre-feet of water rights have been permitted in the Basin. In 2011, the Legislature enacted NRS 534.037

¹ By Anne-Greyson Long.

² *Eureka County v. Seventh Judicial Dist. Court (Sadler Ranch)*, 134 Nev. 275, 276, 417 P.3d 1121, 1122 (2018).

and amended NRS 534.110 to allow the State Engineer to approve a Groundwater Management Plan that would help resolve groundwater shortages in over-appropriated basins, similar to Diamond Valley. Diamond Valley was designated a Critical Management Area in 2015. In 2018, after a public hearing and written comments, the State Engineer approved the GMP for the Basin. The plan called for reduced pumping from the Basin at 5-year intervals. The GMP reduced the amount of water that rights holders can use based on the priority of holders' rights. It deviated from the doctrine of prior appropriation in that it required all water rights holders to reduce their withdrawals from the Basin. Respondents who were senior rights holders in the Basin, filed petitions for judicial review. The district court consolidated those petitions. The Respondents sought to invalidate the GMP because it deviated from the water-law principles, namely the doctrine of prior appropriation and from Nevada's statutory scheme, making the plan erroneous. The district court granted the respondents' consolidated petitions for judicial review and invalidated Order No. 1302. The following reasons were cited. (1) the doctrine of prior appropriation was violated because senior appropriators were required to reduce water usage; (2) NRS 533.035 was violated by allowing unused groundwater to be banked or transferred and (3) two permitting statutes were violated, NRS 533.325 and NRS 533.345 by allowing appropriators to change the point or manner of diversion without filing an application with the State Engineer. The district court concluded that NRS 534.037 and NRS 534.110(7) do not give the State Engineer discretion to approve a GMP that deviates from the principles and statutes previously set forth. Order No. 1302 was invalidated. The district court did find that the State Engineer's analysis of the factors under NRS 534.037(2) were supported by substantial evidence.

The State Engineer and several rights holders in the Basin, appellants, appealed. They argue that the Legislature clearly gave the State Engineer discretion to approve a GMP that deviates from the doctrine of prior appropriation and other provisions as long as the State Engineer considers the factors enumerated in NRS 534.037 (2) and determines that the GMP will remove the basin's designation as a CMA. Respondents put forth that the district court's order should be affirmed because the GMP reduces their water rights based on an erroneous interpretation of the law. At oral argument, Respondents were asked if they presented any evidence to the State Engineer evidencing the extent to which their water rights were affected by the GMP. They did not. Nor did they ask the State Engineer to make those calculations. Respondents were also asked if they presented any calculus to the district court showing that any of their water rights were affected by the GMP. They responded in the negative.

Discussion

Standard of review

“The decision of the State Engineer is prima facie correct, and the burden of proof is upon the party attacking the same.” NRS 533.450(10). The Court in its review determines

whether the State Engineer's decision was arbitrary or capricious. The Court reviews purely legal questions without deference to the State Engineer's ruling.³ The Court reviews the State Engineer's factual finding for an abuse of discretion and will overturn those findings only if they are not supported by substantial evidence.⁴

NRS 534.037 and NRS 534.110(7) plainly and unambiguously allow the State Engineer to approve a GMP that departs from the doctrine of prior appropriation and other statutes in Nevada's water scheme.

Appellants argue that NRS 534.110(7) unambiguously allows the State Engineer to approve a GMP that departs from the doctrine of prior appropriation. Respondents argue that if the statute is ambiguous, the presumption is that the Legislature did not intend to repeal the doctrine of prior appropriation. The Court determined that NRS 534.110 (7) permits regulation in a manner inconsistent with the doctrine of prior appropriation if a GMP has been approved for the basin. The Court rejected respondents' position that a GMP must strictly comply with the doctrine of prior appropriation. The Court concluded that the State Engineer's legal conclusions were not erroneous as long as the State Engineer complied with the foregoing statutory criteria. Further, the Court rejected the respondents' argument that the State Engineer's legal conclusions in Order No. 1302 were erroneous and therefore arbitrary and capricious.

The Court acknowledges the dissenting opinions by reiterating that NRS 534.037 and NRS 534.110 (7) are unambiguous. The dissenting opinions cite the canon of constitutional avoidance and legislative history to interpret the statute. The Court noted that these tools cannot be consulted when the statutory text is plain and unambiguous.⁵ The Court reiterated that their holding applies only to priority rights and does not impair vested water rights.

Further, the Court separately addressed Justice Pickering's dissent for three reasons: (1) it interprets NRS 534.037 and NRS 534.110(7) in a manner that would render these statutes nugatory. The Court disagreed with Pickering noting that interpretation to be absurd. (2) Pickering seemingly relied on unpassed legislation to interpret NRS 534.110(7). The Court concluded that citing unpassed legislation is unpersuasive.⁶ (3) The Court declined to reach constitutional questions identified by Justice Pickering that are not essential to the decision, such as the Takings Clause.⁷

As noted, the respondents conceded that they never presented evidence to the State Engineer or the district court to show that the GMP affected their vested water rights and noted that any Takings Clause claim "would certainly come later.". The Court noted that they declined

³ Pyramid Lake Paiute Tribe of Indians v. Ricci, 126 Nev. 521, 525, 245 P.3d 1145, 1148 (2010).

⁴ Sierra Pac. Indus v. Wilson, 135 Nev. 105, 108, 440 P.3d 37, 40 (2019).

⁵ See generally Ratzlaf, 520 U.S. at 147-48.

⁶ See Pension Benefit Guar. Copr. v. The LTV Corp. 496 U.S. 633, 650 (1990), see also Grupe Dev. Co. v. Superior Court, 844 P.2d 545, 552, (Cal. 1993), see also Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 119 (2007).

⁷ See Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 205 (2009).

to address any constitutional issue because doing so would lead to an advisory opinion. The Court concluded that the GMP was not arbitrary or capricious.

The factual findings for Order No. 1302 are supported by substantial evidence, and therefore, the State Engineer did not abuse his discretion.

The Court upheld the State Engineer's findings for Order No. 1302 if they are supported by substantial evidence. A majority of the Basin's permit and certificate holders petitioned the State Engineer to approve the GMP. The State Engineer made extensive findings under NRS 534.037(2). The State Engineer concluded that the GMP would reduce withdrawals to the Basin's perennial yield and therefore remove the Basin from the CMA designation. The Court rejected respondents' argument that the State Engineer's findings were unsupported by substantial evidence. The Court concluded that the State Engineer's decision to approve Order No. 1302 is entitled to deference.

Conclusion

The Court concluded that the State Engineer's decision to approve the GMP was not erroneous. Additionally, the Court found that the State Engineer's factual findings in support of his decision were supported by substantial evidence. The district court's decision granting respondents' consolidated petitions for judicial review was reversed and the State Engineer's decision was reinstated.

PARRAGUIREE, C.J., with whom SILVER, J., agrees, dissenting:

Justices Parraguirre and Silver dissented for two reasons. First, the justices put forth that NRS 534.037 and NRS 534.110(7) do not "plainly and unambiguously" allow the State Engineer to approve a Groundwater Management Plan that departs from the doctrine of prior appropriation. Second, 1302 erroneously abdicates the beneficial use requirement and fails to consider whether curtailment will impair vested surface water rights.⁸

Facts

The GMP requires senior appropriators to use less water than they are entitled to use under the doctrine of prior appropriation. For illustrative purposes, if a senior appropriator was entitled to 100 acre-feet of water per year, the GMP allows the appropriator to use only 67 acre-feet of water per year during the first 5 years of the plan. A junior appropriator, who is not entitled to any water under the doctrine of prior appropriation, would be allowed to use 54 acre-feet of water per year during the first 5 years of the plan. By year 35 of the plan, the senior appropriator would be allowed 30 acre-feet of water per year and the junior appropriator would be allowed 24 acre-feet of water. The GMP provides for a system whereby appropriators can buy, sell, or lease their water rights to other appropriators.⁹

⁸ See NRS 534.037, NRS 534.110(7), 1302.

⁹ State Engineering Order No. 1302 (Jan. 11, 2019).

DISCUSSION

Standard of review

On a petition for judicial review, “we determine whether the State Engineer’s decision was arbitrary or capricious.”¹⁰

The doctrine of prior appropriation

The dissenting justices contend that the Legislature did not intend to abrogate long-standing law. Nevada’s water law is founded on the fundamental principle of prior appropriation. Rather than law, the majority considered this doctrine a “guiding principle.”¹¹ The dissenting justices entered into a discussion and explanation of Nevada’s 155 history of prior appropriation concluding that prior appropriation is not a mere guiding principle but is fundamental to water law in Nevada.

NRS 534.110(7) does not allow the State Engineer to approve a GMP that departs from the doctrine of prior appropriation

The dissenting justices argue that NRS 534.037 does not speak to the doctrine of prior appropriation, must less authorize the State Engineer to disregard the doctrine and point to evidence that will be discussed below.

NRS 534.110(7) is ambiguous

The dissenting justices noted that looking beyond a statute’s text is only necessary if it is ambiguous. If so, the court must look to the legislative history and rules of statutory interpretation to determine its meaning. NRS 534.110(7) is ambiguous because the parties’ arguments show that it is susceptible to more than one reasonable interpretation. The dissenting justices advised that because NRS 534.110(7) is ambiguous, the rules of statutory interpretation and legislative history must be consulted.

Implied repeal

“The presumption is always against the intention to repeal where express terms (of repeal) are not used.”¹² The dissenting justices agree with the respondents’ proposed interpretation of NRS 534.110(7) because appellants’ interpretation would abrogate the prior appropriation doctrine without an express declaration in the statutory text. The Court have recognized that Nevada follows the prior appropriation doctrine. However, Order 1302 does not comport with that doctrine.

¹⁰ King v. St. Clair, 134 Nev. 137, 139, 414 P.3d 314, 316 (2018).

¹¹ See Majority op., ante at 4.

¹² Presson v. Presson, 38 Nev. 203, 208-09, 147 P.1081, 1082 (1915).

Legislative history

Legislative history supports the conclusion that NRS 534.110(7) was not intended to allow the State Engineer to adopt a GMP inconsistent with the doctrine of prior appropriation.¹³ The justices noted a bill sponsored by Assemblyperson Pete Goicoechea (2011) in which he discussed how GMPs would treat priority rights. Goicoechea stated, “Water rights in Nevada are first in time, first in right. The older the water right, the higher the priority.”¹⁴ The legislative history makes clear that junior – not senior appropriators have the burden of reducing water usage under a GMP.

Constitutional avoidance

The dissenting justices concluded that the respondents’ proposed interpretation of NRS 534.037 and NRS 534.110(7) should be adopted because it avoids constitutional doubts under the Takings Clause. Noting that Nevada’s water law gives senior appropriators at least three sticks in the bundle of property rights: the right to transfer, the right of use and enjoyment, and the right to exclude. Property rights, therefore, are subject to the Takings Clause.¹⁵

The dissenting justices noted three United States Supreme Court cases and asserted that requiring senior appropriators to pump less groundwater before junior appropriators are forced to cease pumping that same groundwater could be a compensable physical taking under the Fifth Amendment.¹⁶ The justices concluded that an interpretation of NRS 534.037 and NRS 534.110(7) that allows the State Engineer to depart from priority regulation and possibly reallocate senior water rights – without compensation following an eminent domain proceeding – could be an unconstitutional physical taking under the Nevada and United States Constitutions. The respondents’ interpretation should prevail.

Conclusion

NRS 534.037 and NRS 534.110(7) are intended to allow all rights holders in an over-appropriated basin to create a collaborative GMP to reduce withdrawals from the basin, with the junior appropriators being asked to reduce water use. If the GMP is approved, the State Engineer need not order curtailment by priority. If the rights holders do not approve the GMP then the State Engineer must order curtailment by priority.

Order 1302 departs from other laws

Order 1302 violates the beneficial use statute and does not account for vested surface water rights.

¹³ See NEV. REV. STAT. 534.037.

¹⁴ Hearing on A.B. 419 Before the Senate Gov’t Affairs Comm., 76th Leg., at 13 (Nev., May 23, 2011).

¹⁵ U.S. CONST. amend. V.

¹⁶ See *Dugan v. Rank*, 372 U.S. 609, 625 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 755 (1950); *Int’l Paper Co. v. United States*, 282 U.S. 399, 405-07 (1931); see also *Washoe County, Nev. v. United States*, 319 F. 3d 1320, 1326 (Fed. Cir. 2003).

The GMP does not comply with the beneficial use statute

The GMP uses a market-based approach. Unused allocations of water may be banked, traded, leased or sold. Unused allocations can be carried over and banked for use in a subsequent year. The cornerstone of allocation is “the basis, the measure and the limit of the right to use of water.” For every application to appropriate water, a “fundamental requirement is that water only be appropriated for beneficial use.” The GMP departs from Nevada’s beneficial use statute because it allows unused water to be banked, sold, traded, or leased rather than allocating water based on beneficial use. The dissenting justices noted that there appears to be no binding or persuasive authority that classifies water banking as a beneficial use in a prior appropriation jurisdiction. Because the GMP contravenes laws delineating beneficial use, it is contrary to established law. The justices held that the State Engineer’s decision to approve Order 1302 was capricious.

The GMP does not account for vested surface water rights

The Diamond Valley GMP does not account for its effect on vested surface water rights. Because statutory law may not impair vested rights, a GMP approved under NRS 534.037 must account for its effect on vested surface water rights under 534.037(2)(g). Accordingly, the State Engineer’s contrary conclusion was capricious because established law requires the preservation of vested rights.

CONCLUSION

The dissenting justices do not believe that the groundwater shortages that impact Diamond Valley and Nevada allow the Court to interpret NRS 534.037 and NRS 534.119(7) contrary to Nevada’s historical water law. The constitution controls over any legislative act, and therefore, the Court should adopt an interpretation of NRS 534.037 and NRS 534.110(7) that avoids constitutional violence. Justice Parraguirre would affirm the district court’s decision to grant respondents’ petition for judicial review because it is his belief that Order 1302 is capricious.

PICKERING, J., with whom SILVER, J., agrees, dissenting:

Justice Pickering argued that the GMP does not compensate or provide a mechanism for compensating the senior water right holders. The GMP presumes but does not require beneficial use of the water rights it counts. These features place the GMP in direct conflict with two fundamental principles underlying Nevada’s water law statutes: the prior appropriation doctrine and beneficial use doctrine.¹⁷ Pickering argues that the majority opines that on a “plain text” reading, NRS 534.110(7) and NRS 534.037 “plainly and unambiguously allow the State Engineer to approve a GMP that departs from the doctrine of prior appropriation and other statutes in Nevada’s water scheme.” She continued that nothing in the text of either statute expressly exempts GMP’s from the prior appropriation and beneficial use doctrines.

¹⁷ See Ross E. deLipkau and Earl M. Hill, *The Nevada Law of Water Rights* 3-17 (2010), *Mineral County v. Lyon County*, 136 Nev. 503, 513, 473 P.3d 418, 426 (2020).

Justice Pickering wrote separate from Chief Justice Parraguirre because of another basic problem with the majority's approach.¹⁸ She argued that a court does not determine a statute's meaning by reading its words out of context, in isolation from the body of statutes it inhabits.¹⁹ The two statutes relied on by the majority are part of the prior appropriation and beneficial use chapters. Unless Legislature expressly exempts GMPs from these doctrines, all GMPs (including Diamond) will remain subject to them.

Justice Pickering argued that the majority compounded its error by looking at NRS 534.037 and the fourth sentence in NRS 534.110(7) and deciding their meaning without considering their text in the larger context of NRS 534.110 and NRS Chapters 533 and 534.²⁰ She believed that allowing the State Engineer to approve a GMP that deviates from the prior appropriation and beneficial use doctrines puts NRS 534.037 and NRS 534.110(7) into direct conflict with the rest of NRS Chapters 533 and 534.

Conclusion

Justice Pickering concluded her dissent by explaining that text, context, and the enforcing agency's original interpretation all militate against the reading that the majority gave NRS 534.110(7) and NRS 534.037.

¹⁸ "In ascertaining the plain meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (Kennedy, J.)

¹⁹ *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) (Statutes in *pari materia* are to be interpreted together, as though they were one law.).

²⁰ "The meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *See Panama Ref. Co. v. Ryan*, 293 U.S. 399, 439 (1935).